

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

BRENDA E. WILLIAMS,
Appellant,

v.

DEPARTMENT OF DEFENSE,
Agency.

DOCKET NUMBER
DC-0752-98-0017-I-1

DATE: September 21, 1999

Laura A. Stefani, Esquire, Kator, Scott & Parks, Washington, D.C., for the appellant.

Richard Saviet, Esquire, Fort Belvoir, Virginia, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The appellant has filed a request to reopen an initial decision that affirmed the agency action removing her from the position of Printing Specialist. For the reasons set forth below, we treat the appellant's request as an untimely filed petition for review, and DISMISS the petition as untimely filed with no showing of good cause for the delay.

BACKGROUND

¶2 The agency removed the appellant based on charges of disrupting the workplace, and refusing to carry out instructions and basic work assignments.

Initial Appeal File (IAF), Tab 3, Subtabs 4B and 4E. The appellant petitioned for appeal. IAF, Tab 1. Although initially she requested a hearing, subsequently, she requested a decision based on the written record without a hearing. IAF, Tabs 1, 4, 10. On February 4, 1998, the administrative judge issued an initial decision based on the written record, finding that the agency proved the charges by preponderant evidence, and that the penalty was reasonable. IAF, Tab 16. The initial decision informed the appellant that a petition for review must be filed by March 11, 1998. *Id.*

¶3 On May 26, 1999, the appellant filed a request to reopen. Petition for Review File (RF), Tab 1. The Clerk of the Board issued a notice informing the appellant that her request to reopen would be treated as a petition for review, but that the petition did not meet the Board's requirements because it was not filed by the March 11, 1998 filing deadline. RF, Tab 2. The notice further informed the appellant that she must file evidence and argument showing good cause for her filing delay. *Id.* The appellant responded to the Clerk's notice. RF, Tab 3.

ANALYSIS

¶4 In her response, the appellant reiterates her request that the Board treat her submission as a request to reopen rather than a petition for review. *Id.* It is well settled, however, that the Board treats a request to reopen an initial decision that became the final decision of the Board when neither party petitioned for review as an untimely filed petition for review. *Boyce v. Department of Veterans Affairs*, 79 M.S.P.R. 402, 404 (1998); *Hatcher v. Department of Justice*, 76 M.S.P.R. 97, 99 (1997), *review dismissed*, 152 F.3d 942 (Fed. Cir. 1998) (Table); *Parkinson v. U.S. Postal Service*, 58 M.S.P.R. 393, 395 (1993), *aff'd*, 31 F.3d 1177 (Fed. Cir. 1994) (Table). Further, the Board generally does not reopen a case under 5 C.F.R. § 1201.118 to cure the untimeliness of a party's petition for review. *Hatcher*, 76 M.S.P.R. at 100; *Santos v. Office of Personnel Management*, 58 M.S.P.R. 408, 409 (1993), *aff'd*, 26 F.3d 137 (Fed. Cir. 1994) (Table).

Because we see no reason to depart from these rules, the appellant's submission will be treated as an untimely filed petition for review.

¶5 A petition for review must be filed within 35 days of the issuance of an initial decision. 5 C.F.R. § 1201.114(d). The Board will waive this time limit only upon a showing of good cause for the delay in filing. 5 C.F.R. §§ 1201.12, 1201.114(f). To establish good cause for the untimely filing of an appeal, a party must show that he exercised due diligence or ordinary prudence under the particular circumstances of the case. *Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980). To determine whether the appellant has shown good cause, the Board will consider the length of the delay, the reasonableness of her excuse and her showing of due diligence, and whether she presented evidence of the existence of circumstances beyond her control, unavoidable casualty, or misfortune that affected her ability to comply with the time limits. *Id.*

¶6 Here, the appellant filed her petition for review more than 14 months after the March 11, 1998 time limit. In her response to the notice, the appellant alleges that she filed her petition in May 1999, after she retained new counsel, because that is when she first learned that an initial decision had been issued in her appeal. RF, Tab 3. According to the record, the appellant designated her current attorney to represent her in this appeal on October 8, 1998. IAF, Tab 17. The appellant, however, provides no explanation for the delay of more than 7 months from the date that she designated her current counsel and the date that she filed her petition for review.

¶7 In her response, the appellant also asserts that she never received notice that an initial decision had been issued in her case. RF, Tab 3. The certificate of service attached to the initial decision indicates that the appellant was served with a copy of the initial decision on February 4, 1998, by regular mail. IAF, Tab 16. The appellant states that she did not receive a copy of the initial decision in the mail. RF, Tab 3. Despite her assertion that she "changed households" after she

was removed, RF, Tab 1, the appellant failed to notify the Board of a change of mailing address. *Cf. Crawford v. Department of State*, 60 M.S.P.R. 441, 444 (1994) (the appellant's change of address is a factor in determining whether she acted with due diligence in filling her appeal 23 days late).

¶8 In her timeliness motion, the appellant appears to contend that she was somehow prevented from previously filing the petition due to the actions or inactions of her representative below. RF, Tab 3. She asserts that she did not receive any communication from her attorney below that a decision had been issued in her appeal. *Id.* She contends that her former attorney misrepresented to her about when a hearing would be held in her case and this prevented her from realizing when an initial decision would be issued. *Id.*

¶9 Where an appellant's diligent efforts to prosecute her appeal were thwarted by her representative's negligence or malfeasance, the appellant and her representative were not acting as one and the representative's negligence or malfeasance should not be attributed to the appellant. *Crawford*, 60 M.S.P.R. at 445-46. Even if we were to accept the appellant's claim that, in February 1998, her attorney lied by stating that he was waiting for a hearing date after he had already withdrawn her request for a hearing, it would not excuse the amount of time that she allowed to elapse after she first allegedly learned of the status of her appeal and the time that she filed the instant petition. *See Green v. Office of Personnel Management*, 36 M.S.P.R. 131, 133 (1988). According to her affidavit, the appellant first learned of the initial decision when she retained new counsel on or before October 8, 1998. RF, Tab 3; IAF, Tab 17. Yet, although experienced in Board procedures, counsel waited another 6 months before taking any action before the Board. RF, Tab 1. The appellant is responsible for the errors of her chosen representative. *Sofio v. Internal Revenue Service*, 7 M.S.P.R. 667, 670 (1981). Accordingly, we dismiss the appellant's petition as untimely filed.

ORDER

¶10 This is the final order of the Merit Systems Protection Board concerning the timeliness of the petition for review. The initial decision will remain the final decision of the Board with regard to the merits of the appeal. Title 5 of the Code of Federal Regulations, section 1201.113 (5 C.F.R. § 1201.113).

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law as well as review other related material at our web site, <http://www.mspb.gov>.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.